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May 26, 1992

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VIA HAND DELIVERY

Federal Communications Commission
Office of the Secretary

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: CC Docket No. 92-90, In the Matter of The Telephone
Consumer Protection Act of 1991

Dear Ms. Searcy:

Enclosed herewith for filing in the referenced proceeding are the original and five (5) copies of the Initial Comments of American Express Company. Also enclosed herewith is a completed Record Image Processing System form to accompany the filing.

Please direct any questions regarding the enclosed Comments to the undersigned.

Respectfully submitted,

Kevin S. DiLallo
Kevin S. DiLallo

Enclosures

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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MAY 26 1992

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
The Telephone Consumer)
Protection Act of 1991)

CC Docket No. 92-90

INITIAL COMMENTS OF AMERICAN EXPRESS COMPANY

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Dated: May 26, 1992

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SUMMARY

American Express Company supports the promulgation of regulations to effectuate the requirements of the Telephone Consumer Protection Act ("TCPA") in a manner which is not unduly restrictive of legitimate business and consumer interests while still serving a broad range of consumer interests.

Live telephone contacts, particularly those which are not made with the intention or expectation of completing a sale during the call, are distinguishable from commercial calls made with prerecorded or artificial voice machines. Available data suggests that the public is not significantly concerned about live calls; therefore, restriction of such calls would not appear to be warranted at this time.

Automatic dialing devices not coupled with prerecorded or artificial voice message delivery perform a necessary function which all callers must perform, and do not adversely affect privacy rights; therefore, the use of such devices should not be restricted except as specifically required by TCPA, e.g., in connection with calls to convalescent rooms, emergency numbers, or numbers where the called party pays for the call.

To the extent that the Commission determines that additional restriction of live telephone solicitations to residences would serve the public interest, Congress has given the Commission a great deal of discretion to fashion a system for implementing such restrictions. The Commission should exercise its discretion in a manner which will give consumers the flexibility to continue

to receive calls about companies, products, and services in which they might be interested.

National or industry databases, directory markings, and NXX code blocking deny consumers this flexibility and therefore are undesirable. Moreover, the substantial cost of national or industry databases and their inherent inability to remain current compound the undesirability of these options. Whatever system, if any, is ultimately selected by the Commission, companies that already have implemented voluntary programs to protect residential subscriber privacy should not be required to abandon those programs merely to replace them with an alternative, untested system selected by the Commission. Proof of good faith efforts to protect residential privacy interests should constitute a defense to any action for inadvertent interference with such interests.

Finally, the proposed exemption of calls to persons with whom the caller has an "established business relationship" should include calls made for debt collection purposes, calls placed by a third party acting as agent for a principal who has a business relationship with the called party, and calls to parties with whom the called party has had a business relationship, whether ongoing or sporadic. The Commission should adopt its own proposed interpretation of the term "business relationship," which should include any voluntary, two-way communication between the caller and the called party.

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Federal Communications Commission
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CC Docket No. 92-90

INITIAL COMMENTS OF AMERICAN EXPRESS COMPANY

American Express Company and its subsidiary companies^{1/}
(collectively referred to herein as "American Express"), through
their undersigned counsel, hereby respectfully submit their
Initial Comments in response to the Notice of Proposed Rulemaking
in the captioned proceeding, FCC 92-176 (released April 17, 1992)
("NPRM").

INTRODUCTION

Consumers transact increasing volumes of personal business
by telephone from their homes, including using their phones to
bank, order groceries and merchandise, pay bills, and obtain a
wide range of information, from sports scores to stock
quotations, to name only a few examples. Technological advances
and the Commission's own existing and proposed policies,
including Video Dialtone, are fueling this trend. To avail
themselves of the increasing variety of products and services

^{1/} American Express Company's subsidiary companies participating
in these Comments include American Express Travel Related
Services Company, Inc., American Express Bank Ltd., IDS Financial
Corporation, Shearson Lehman Brothers, Inc., and First Data
Corporation.

that are offered over the public switched network, consumers need information. As with other limits on speech, regulatory policies in this area should be narrowly tailored. Any restrictions that are adopted should not be so broad as to erect a wall between consumers and all sources of informational commercial speech, including calls which consumers would prefer to receive.

American Express believes that the full range of consumer interests should be considered in this proceeding. Such an approach would result in regulations that more realistically address consumers' increasing use of the telephone to conduct personal business. The Commission may fashion regulations that are truly in the public interest only by taking into account all relevant consumer interests and desires, rather than assuming that consumers' paramount interest is in blocking all incoming communications from business.

A. Live Telephone Solicitations Require Less Regulatory Attention than Artificial or Prerecorded Voice Solicitations

The legislative history of the Telephone Consumer Protection Act, Pub. L. No. 102-243 ("TCPA"), pursuant to which this proceeding has been initiated, reveals that Congress's chief objectives in enacting TCPA were:

- to restrict the use of automatic dialing devices or artificial or prerecorded voice machines to call emergency telephone numbers, convalescent rooms, and telephone numbers where the called parties pay for the calls;
- to restrict the use of artificial or prerecorded voice machines to call residential telephone subscribers;

- to restrict the use of facsimile machines to send unsolicited advertisements;
- to prohibit automatic dialing devices from engaging more than one line of a multi-line business simultaneously; and
- to promulgate technical requirements for artificial or prerecorded voice machines and facsimile transmissions.

The text and legislative history of TCPA indicate that Congress has not concluded that live commercial telephone solicitations pose a significant threat to residential subscriber privacy which should be curbed. Congress therefore granted the Commission the greatest degree of discretion in determining whether there is a need for restrictions on live telephone solicitation calls to residential telephone numbers, and, if so, the scope of those restrictions and the manner in which they should be implemented.

Anecdotal evidence in the House and Senate Reports on the various bills in which Congress proposed restriction of commercial telephone calls (of which S. 1462 ultimately became law) demonstrates that consumers' primary concern in this area is the use of artificial or prerecorded voice devices.^{2/} As the NPRM states, fewer than 10% of all consumer complaints to the Commission last year concerned live solicitations; the rest resulted from automated calls.

^{2/} See, e.g., S. Rep. No. 102-178, 102d Cong., 1st Sess. at 2-5; H.R. Rep. No. 102-317, 102d Cong., 1st Sess. at 9; 137 Cong. Rec. S16206 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

The mere fact, as stated by Congress and the Commission, that over \$435 billion in sales in 1990 resulted from unsolicited sales calls demonstrates that many consumers enjoy the convenience of being notified by telephone of available products and services.^{3/} It is important, therefore, that the interests of such consumers not be ignored in determining whether additional restrictions for live telephone solicitations are necessary, and, if so, what such restrictions should be and the manner in which such restrictions should be implemented.

American Express concurs with preliminary Commission findings that the preponderant weight of information does not indicate a need to curb live telephone solicitations to residential subscribers; however, to the extent that any restrictions are adopted in this regard, such restrictions should be carefully tailored to avoid prohibitions which are too broad and therefore unduly restrictive of legitimate business and consumer interests that Congress did not intend to compromise.

B. Certain Categories of Commercial Calls Need Not Be Restricted

TCPA authorizes the Commission to consider restriction of live calls only to the extent that they constitute objectionable "telephone solicitations."^{4/} American Express advocates interpreting the term "telephone solicitation" in accordance with

^{3/} TCPA, Pub. L. No. 102-243, 105 Stat. 2394, at § 2(4); NPRM at ¶¶ 22-26; S. Rep. No. 102-178, 102d Cong., 1st Sess. at 2-5.

^{4/} 47 U.S.C. § 227(c)(1).

TCPA to mean any call placed with the intention or expectation of completing a sale during the call.^{5/}

Certain types of informational commercial calls are not invasive of consumer privacy and in fact are welcomed by consumers. Such calls, which do not involve the intention or expectation of completing a sale during the call, would include without limitation calls to inform consumers that ordered merchandise has arrived, to schedule appointments, to invite consumers to seminars, and to notify consumers about sales. Although they may ultimately result in a completed transaction, a primary purpose of such calls is to provide consumers with information, often about previously unknown products, services, or companies; therefore, such calls serve a legitimate consumer-oriented purpose and do not pose a significant threat to consumer privacy.^{6/} Such calls should therefore be permitted.

^{5/} This definition would appear to be consistent with Congressional intent, as expressed in the House Report of an earlier version of TCPA, H.R. 1304. That Report stated that "[t]o come within the definition [of 'telephone solicitation'], a caller must encourage a commercial transaction." H.R. Rep. No. 102-317, 102d Cong., 1st Sess. at 13.

^{6/} Congress seems to have contemplated that such calls should not be restricted. The Senate Committee Report on an earlier version of TCPA, S. 1410, stated that

[t]he Committee believes that the term "unsolicited telephone solicitation" should be defined in greater detail by the FCC in carrying out its rulemaking. In so doing, the FCC should examine consumers' desires as to which calls made by which businesses, and concerning which products or services, the consumer would ordinarily object to receiving. . . . [T]he FCC also should keep in mind the need to establish terms for fair competition[.] The FCC should recognize that it

(continued...)

For example, a call might be placed to inform consumers about an informational seminar. After attending the seminar, some consumers may initiate a business relationship with the party hosting the seminar. Although the initial call "advertised" the seminar in the strictest sense of the word, it is distinguishable from calls made with the expectation or intention of completing a sale during the call and should be accorded lighter regulatory treatment.

**C. The Use of Automatic Dialing Devices Not
 Coupled With Artificial or Prerecorded
 Voice Solicitations Need Not Be Restricted**

Although the language of TCPA, its legislative history, and even the Commission's NPRM contain infrequent instances of confusion of the terms "automatic dialing device" and "artificial or prerecorded voice machine," it seems clear from the text of TCPA that Congress recognizes that automatic dialing devices (i.e., those which are not coupled with artificial or prerecorded voice machines) pose virtually no threat to residential privacy

6/ (...continued)

may be anticompetitive to allow certain companies to call consumers to offer a product or service related to [an] initial transaction and not to allow competitors to make such calls.

S. Rep. No. 102-177, 102d Cong., 1st Sess at 5.

interests.^{2/} Compare 47 U.S.C. § 227(b)(1)(A) with 47 U.S.C. § 227(b)(1)(B).

It is important that a distinction be made, as Congress intended, between autodialers and artificial or prerecorded voice machines. The former merely accomplish a function -- dialing -- which all callers must do, and therefore pose no added threat to privacy, while the latter are arguably more intrusive, as they actually deliver a (sometimes unwanted) message.

The Commission seems to appreciate the vital role that automatic dialing devices play in telephone calling for commercial and non-commercial purposes when the goal is to reach as many people as possible in the shortest time. This is particularly true in cases of emergencies or public safety notifications, but it also is true in the commercial context. TCPA does not require, and public policy does not support, broad restrictions on the use of automatic dialing devices beyond those specifically enumerated by TCPA, i.e., to call emergency telephone numbers, convalescent rooms, and telephone numbers where the called parties pay for the calls, and to engage simultaneously more than one line of a multi-line business. Devices which merely dial telephone numbers automatically -- a

^{2/} One potentially significant example of this confusion is illustrated by the Commission's statement that "[a]uto dialer calls are prohibited to: residential telephone lines without the consent of the called party" NPRM at ¶ 8. In fact, neither TCPA nor the Commission's proposed rules would prohibit such calls, although both TCPA and the proposed rules would prohibit the use of artificial or prerecorded voice machines to make such calls.

function that every caller must perform -- do not infringe on the privacy interests TCPA seeks to protect.

In light of the legitimate uses of automatic dialing devices and their failure to infringe on privacy interests, American Express does not support expansion of the prohibitions on the use of automatic dialing devices beyond those specifically enumerated in TCPA.

D. The Commission Should Reject National or Industry Databases, NXX Code Blocking, and Directory Markings In Selecting a Method for Protecting Residential Privacy

It is not clear that public reaction to live telephone solicitations supports any restriction of live telephone solicitations or establishment of any method to protect residential subscriber privacy; however, if the Commission determines that some system is needed to restrict live telephone solicitations to residences, it should select a system which provides the greatest degree of flexibility to consumers (and therefore best serves consumer interests) while imposing the lightest burden on commercial speech. Any system which denies the consumer the right to choose between information sources which she wishes to receive and those she does not would disserve consumer interests and thwart economic growth.^{8/}

^{8/} Congress seems to have anticipated that the Commission's action would give consumers the flexibility to receive calls about businesses, products, and services in which they may be interested. See 137 Cong. Rec. H10343-44 (daily ed. Nov. 18, 1991) (statement of Rep. Cooper); S. Rep. No. 102-177, 102d Cong., 1st Sess at 5.

Many companies already have voluntarily implemented their own company-specific policies for protecting residential subscriber privacy. In the interest of minimizing waste of corporate investment in such systems, such companies should not be required to adopt any new system devised by the Commission. It would seem needlessly wasteful to require such companies to abandon existing programs merely to replace them with new procedures which have not yet been tested and which may not be suited to the distinct needs of the companies or their customers.

Regardless of the system (if any) ultimately selected by the Commission, a few ground rules should be considered. First, to avoid fraud and potential abuses, consumer requests for privacy protection should be in writing. Second, depending on the procedures selected, businesses should be given ample lead time to implement the procedures and to train personnel. Third, proof of implementation of the required procedures and good faith efforts to comply with the procedures should constitute a complete defense to any consumer action brought pursuant to the residential privacy protection provisions of TCPA, 47 U.S.C. § 227(c); TCPA itself contemplates such a defense. See 47 U.S.C. § 227(c)(5).^{2/}

American Express is still evaluating the efficacy of self-administered company "do-not-call" lists as a means of restricting solicitations to objecting residential subscribers,

^{2/} Such a defense should at a minimum encompass calls inadvertently placed despite good faith efforts on the part of the caller to comply with the Commission's requirements.

and it looks forward to learning more about this option from other commenters. American Express has concluded, however, that three of the proposed systems -- national or industry-wide databases, directory markings, and NXX code blocking -- are clearly infeasible and inefficient and should be rejected from the outset.

1. National or industry-wide "do-not-call" databases

The most clearly infeasible of the proposed privacy protection systems is the establishment of a national database containing the names and telephone numbers of residential telephone subscribers that do not wish to receive live telephone solicitations. For the same reasons, albeit to a lesser extent, the adoption of industry-wide databases also would be infeasible and inefficient.

The most obvious reason why either of such databases would not work is the cost of establishing and maintaining such a database. TCPA will not permit residential telephone subscribers to pay for such a system, and the Commission has tentatively concluded (for obvious and sound fiscal reasons) that the federal government will not sponsor or pay for such a system; therefore, industry would have to pay for the system, and the cost will be enormous.

As the NPRM reports, the Florida state database costs ten dollars per residential telephone subscriber, and telemarketing companies must pay \$1600 annually for the data in magnetic form or \$1000 for the data on paper. Such costs are recurring, as the

database is updated quarterly. The Commission has properly recognized that this cost probably would be multiplied exponentially if the database encompassed telephone subscribers from all fifty states and the District of Columbia.^{10/} One estimate cited by Congress for the cost of designing and implementing a national database was between \$1 and \$6 million.^{11/} Such estimate would not seem to account for the substantial costs of (1) notifying consumers about the existence of the database; (2) gathering data from consumers; (3) disseminating data about participating consumers to over 30,000 businesses and over 300,000 individual telemarketers who would need such data;^{12/} and (4) updating such data on a regular basis. Although such additional costs are virtually impossible to calculate reliably until the exact nature and features of the system are determined, such costs are likely to be some tens of millions of dollars.

In light of the existence of other lower cost alternatives, the cost of establishing such a database simply would not seem to justify its limited benefits.^{13/} This conclusion is

^{10/} NPRM at para 28.

^{11/} H.R. Rep. No. 102-317, 102d Cong., 1st Sess. at 22.

^{12/} See TCPA, Pub. L. No. 102-243, 105 Stat. 2394, at § 2(2), (3).

^{13/} While a national database would conceivably provide some benefit to consumers who do not wish to receive any commercial telephone calls, it would not accommodate the needs of consumers that prefer to specify the types of calls they wish to avoid. This limited benefit would not seem to justify the extraordinary
(continued...)

particularly true in the case of companies that have already implemented privacy protections in response to the requests of their customers; a national or industry database would provide virtually no, if any, additional privacy protection to the customers of such companies at great additional cost.

A national database also would disserve consumer interests by denying them the flexibility to choose between products or companies about which they wish to receive information and those about which they do not wish to hear. Such inflexibility may account for the relatively insignificant portion of the Florida population that has elected to participate in that state's database: of the almost 5 million households in the state, only 28,000, or roughly one-half of one percent, had elected to participate in the state database as of last December,^{14/} and that rate seems to be declining. Experience with the Florida database hardly argues for implementation of a national model.

Not only would consumer interests be ill-served by a national database, but small and emerging businesses would be greatly and disproportionately disadvantaged. Smaller businesses that have little or no computer capability would be required either to make significant investments in the hardware and software required to use a national database or to use cumbersome

^{13/} (...continued)

disadvantages of a national database, particularly when compared to less expensive, more flexible privacy protection systems.

^{14/} See "Have You Been Cold-Called?", Fortune (Dec. 16, 1991) at 109.

volumes of printed material. Emerging businesses that would otherwise build a client base by making telephone solicitations would be barred from contacting persons included in the database, although such persons would continue to do business with companies with which they had had relationships prior to inclusion on the database. This result would disadvantage consumers as well as emerging businesses by depriving consumers of knowledge of competitive offerings which might be better than products or services they already are purchasing from existing suppliers.

Moreover, a database (either on the national or industry levels) would be difficult to administer, and would tend to be in a perpetual state of obsolescence. The Commission has indicated that the federal government will not administer or contract to administer a national database; therefore, the Commission would have to assign responsibility for administering the system. Presumably, any for-profit entity that would administer such a database would only increase the already formidable cost of establishing and maintaining the database due to its need to make a profit on the operation.

Another drawback of a national database would be its inherent inability ever to be current. The House Committee Report on an earlier version of TCPA predicted that a lag time would occur between a consumer's choosing to be included in the database and implementation of that choice. The Committee estimated that six to twelve months would elapse between

subscribers' moving or obtaining new telephone numbers and the inclusion of the new numbers in the database.^{15/}

As for an industry-wide database, defining "industries" which should share a database and assigning diversified companies to industry groups would prove extremely difficult. It would be inappropriate to include a company in one industry group merely because one of its many subsidiary operations could be defined as a member of that industry.

The attention Congress devoted in TCPA to the details of potentially establishing a national or industry database suggests that Congress recognized that such an option could be fraught with potential administrative and policy problems. American Express strongly opposes either the national or the industry-wide database options.

2. Directory markings

For many of the same reasons that national or industry-wide databases would not be a reasonable means of protecting residential subscriber privacy, so too would directory markings prove inadequate. Directory markings are analytically no different than a national database; only the format is different. As a practical matter, printed directories would have to be converted to electronic form to be manageable and usable by a large number of telemarketers.

Not only would such a system be costly, cumbersome, and become outdated quickly, it would impose additional costs on

^{15/} H.R. Rep. No. 102-317, 102d Cong., 1st Sess. at 24.

carriers that might either be passed through indirectly to telephone subscribers (TCPA prohibits subscribers from paying for protection, but pass-through may be difficult to trace) or passed through to consumers by companies forced to pay for the compilation of such directories -- a daunting expense.

In addition, as with a national database, smaller businesses that have little or no computer capability would be faced with the Hobson's choice of either making significant investments in the hardware and software required to use "marked" electronic directories or using cumbersome volumes of printed directories. For telemarketers that operate on a national level, the sheer volume of paper would require significant changes in the manner in which such firms conduct business.

Moreover, directory markings deprive consumers of the ability to choose between calls they wish to receive and those they do not. Consumers would have only two choices: either to be called for the entire gamut of commercial purposes (e.g., to buy life insurance, to learn that ordered merchandise has arrived, or to learn of a sale at a local store), or not to be called at all, even for purposes for which they might want to be called.

3. NXX code blocking

Finally, NXX code blocking should not be adopted as a means of protecting residential subscriber privacy. The Commission itself has recognized that current network technologies may not be able to support such a system, particularly on an interstate

basis where NXX codes are preceded by an area code.^{16/}

Moreover, all telemarketers would have to have new telephone numbers assigned, with the same prefixes. The large number of telemarketers operating in this country (in the thousands) may make such a program difficult to administer and monitor. Because of the "established-business-relationship" exemption and the "all-or-none" nature of NXX code blocking, the use of NXX code blocking would require companies that telemarket to existing customers to maintain two sets of telephone lines: one for existing customers, and another for potential customers.

E. The "Established Business Relationship" Exception Should Encompass Past, as Well as Ongoing, Business Affiliations and Voluntary Two-Way Communications Between Consumers and Commercial Interests

The legislative history of TCPA demonstrates that a significant concern of Congress has been to avoid interfering with established business relationships, and to design privacy protections which would accommodate business relationships. Although the legislative history of TCPA provides little guidance as to the scope of the business relationship which Congress intended to include in the statutory exemption, it may be significant that the Act would exclude "established," rather than "existing" business relationships. There are numerous legitimate business reasons which would support a definition of "established business relationship" that includes ongoing business relationships as well as relationships which existed at some

^{16/} NPRM at ¶ 30.

point in the past and relationships that involve only periodic two-way contacts, such as sporadic ordering of merchandise from a catalog.

If a customer terminates a business relationship due to poor service or quality of goods, many businesses will contact the former customer to ascertain her reasons for terminating the relationship. Only through such contacts can companies perform an important quality control function. Another legitimate reason to include past business relationships within the scope of the exemption is to facilitate debt collection, which the Commission has recognized a need to protect.^{17/} The primary method businesses use to attempt to recover overdue payments is via telephone; therefore, to eliminate this option would be to deprive businesses of a desperately needed vehicle for contacting delinquent parties.

TCPA does not define "business relationship," but the Commission has posited a definition which American Express supports. For purposes of the exemption, a "business relationship" should include any voluntary two-way communication between parties, whether or not money, goods, or services are exchanged or provided. Such a definition recognizes that transacting business often does not result in a transfer of money, goods, or services.

The "established-business-relationship" exemption also should include third parties who act as agents of one of the

^{17/} NPRM at ¶¶ 15-16.

parties to the business relationship. Such inclusion is important because many companies sub-contract their telephone marketing and debt collection work; the exemption should look to the relationship between the principals, and ignore any such agency relationships.

CONCLUSION

American Express supports efforts by the Commission to protect consumer privacy interests in a reasonable, efficient, and economic manner, and it urges the Commission to adopt rules in this proceeding that are consistent with the views expressed herein.

Respectfully submitted,

AMERICAN EXPRESS COMPANY

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Dated: May 26, 1992